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No. 00-549

In the Supreme Court of the United States

CEDRIC KUSHNER PROMOTIONS, LTD., PETITIONER

v.

DON KING, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

BARBARA D. UNDERWOOD
Acting Solicitor General
Counsel of Record
JOHN C. KEENEY
Acting Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
AUSTIN C. SCHLICK
Assistant to the Solicitor General
DEBORAH WATSON
FRANK J. MARINE
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

HDP

QUESTION PRESENTED

The Racketeer Influenced and Corrupt Organizations Act (RICO) makes it "unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate * * * in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." 18 U.S.C. 1962(c). The question in this case is whether a claim may be maintained under that provision when the alleged RICO "enterprise" is a corporation and the "person" charged with the violation is an officer and employee of the corporation acting within the scope of his corporate duties.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statutory provisions involved	2
Summary of argument	6
Argument:	
Corporate officers and employees who conduct a pattern of racketeering activity through their corporation are subject to RICO liability under Section 1962(c)	7
A. The defendant in an action under Section 1962(c) must be distinct from the alleged racketeering enterprise	7
B. The distinctness requirement is satisfied where the defendant is an employee of a corporation that is the RICO enterprise	11
C. The distinctness requirement is satisfied when the RICO person and the RICO enterprise are either legally or practically separable	21
Conclusion	28
Appendix	1a

TABLE OF AUTHORITIES

Cases:

Anderson v. *Abbott*, 321 U.S. 349 (1944)	27
Bessette v. *Avco Fin. Servs., Inc.*, 230 F.3d 439 (1st Cir. 2000)	6
Brady v. *Dairy Fresh Prods. Co.*, 974 F.2d 1149 (9th Cir. 1992)	21
Brittingham v. *Mobil Corp.*, 943 F.2d 297 (3d Cir. 1991)	10, 17
Burnet v. *Clark*, 287 U.S. 410 (1932)	24
Burzynski, In re, 989 F.2d 733 (5th Cir. 1993)	10

Cases–Continued: Page

Busby v. *Crown Supply, Inc.*, 896 F.2d 833 (4th Cir. 1990) 10
Copperweld Corp. v. *Independence Tube Corp.*, 467 U.S. 752 (1984) 19, 24
Cullen v. *Margiotta*, 811 F.2d 698 (2d Cir. 1987) 10
Davis v. *Mutual Life Ins. Co.*, 6 F.3d 367 (6th Cir. 1993), cert. denied, 510 U.S. 1193 (1994) 21
Discon, Inc. v. *NYNEX Corp.*, 93 F.3d 1055 (2d. Cir. 1996), vacated on other grounds, 525 U.S. 128 (1998) 3-4, 5, 17, 18
Faragher v. *City of Boca Raton*, 524 U.S. 775 (1998) 20, 21
Genty v. *Resolution Trust Corp.*, 937 F.2d 899 (3d Cir. 1991) 10
Guidry v. *Bank of LaPlace*, 954 F.2d 278 (5th Cir. 1992) 22, 27
H.J. Inc. v. *Northwestern Bell Tel. Co.*, 492 U.S. 229 (1989) 14
Haroco v. *American Nat'l Bank & Trust Co.*, 747 F.2d 384 (7th Cir. 1984), aff'd per curiam on other grounds, 473 U.S. 606 (1985) 19
Jaguar Cars, Inc. v. *Royal Oaks Motor Car Co.*, 46 F.3d 258 (3d Cir. 1995) 22
Khurana v. *Innovative Health Care Sys., Inc.*, 130 F.3d 143 (5th Cir. 1997) 6
LeBoeuf, Lamb, Greene & Macrae, L.L.P. v. *Worsham*, 185 F.3d 61 (2d Cir. 1999) 24
McCullough v. *Suter*, 757 F.2d 142 (7th Cir. 1985) 7, 8, 22, 23, 24, 25, 27
Moline Props., Inc. v. *Commissioner*, 319 U.S. 436 (1943) 25, 27
NLRB v. *Deena Artware, Inc.*, 361 U.S. 398 (1960) 24
New Beckley Mining Corp. v. *United Mine Workers of Am.*, 18 F.3d 1161 (4th Cir. 1994) 10

Cases–Continued:

	Page
New Colonial Ice Co. v. *Helvering*, 292 U.S. 435 (1934)	24, 26
Reves v. *Ernst & Young*, 507 U.S. 170 (1993)	11, 12, 14, 15
Richmond v. *Nationwide Cassel L.P.*, 52 F.3d 640 (7th Cir. 1995)	22
Riverwoods Chappaqua Corp. v. *Marine Midland Bank, N.A.*, 30 F.3d 339 (2d Cir. 1994)	4, 5, 10, 16
Russello v. *United States*, 464 U.S. 16 (1983)	7, 8, 13
Salinas v. *United States*, 522 U.S. 52 (1997)	13
Schreiber Distrib. Co. v. *Serv-Well Furniture Co.*, 806 F.2d 1393 (9th Cir. 1986)	10
Securitron Magnalock Corp. v. *Schnabolk*, 65 F.3d 256 (2d Cir. 1995), cert. denied, 516 U.S. 1114 (1996)	10
Sedima, S.P.R.L. v. *Imrex Co.*, 473 U.S. 479 (1985)	3, 8, 13, 22
Sever v. *Alaska Pulp Corp.*, 978 F.2d 1529 (9th Cir. 1992)	25
United States v. *Ames Sintering Co.*, 927 F.2d 232 (6th Cir. 1990)	20
United States v. *Benny*, 786 F.2d 1410 (9th Cir.), cert. denied, 479 U.S. 1017 (1986)	22, 27
United States v. *Bestfoods*, 524 U.S. 51 (1998)	26
United States v. *District Council of United Bhd. of Carpenters*, 778 F. Supp. 738 (S.D.N.Y. 1991)	23
United States v. *Fairchild*, 189 F.3d 769 (8th Cir. 1999)	10
United States v. *Fidelity Capital Corp.*, 920 F.2d 827 (11th Cir. 1991)	26
United States v. *Goldin Indus., Inc.*:	
219 F.3d 1268 (11th Cir. 2000)	7, 9
219 F.3d 1271 (11th Cir.), cert. denied, 121 S. Ct. 573 (2000)	9, 10, 22

Cases–Continued: Page

United States v. *Gonzales*, 520 U.S. 1 (1997) 13
United States v. *Hartley*, 678 F.2d 961 (11th Cir. 1982), cert. denied, 459 U.S. 1170 (1983) 8, 9, 20
United States v. *Horak*, 833 F.2d 1235 (7th Cir. 1987) 14
United States v. *Huber*, 603 F.2d 387 (2d Cir. 1979), cert. denied, 445 U.S. 927 (1980) 14
United States v. *Hugh Chalmers Chevrolet-Toyota, Inc.*, 800 F.2d 737 (8th Cir. 1986) 20
United States v. *Kravitz*, 738 F.2d 102 (3d Cir. 1984), cert. denied, 470 U.S. 1052 (1985) 14
United States v. *Local 560 of Int'l Bhd. of Teamsters*, 780 F.2d 267 (3d Cir. 1985), cert. denied, 476 U.S. 1140 (1986) 23
United States v. *Local 30, United Slate, Tile & Composition Roofers*, 871 F.2d 401 (3d Cir.), cert. denied, 493 U.S. 953 (1989) 23
United States v. *Local 6A, Cement & Concrete Workers*, 663 F. Supp. 192 (S.D.N.Y. 1986) 23
United States v. *London*, 66 F.3d 1227 (1st Cir. 1995), cert. denied, 517 U.S. 1155 (1996) 10, 27
United States v. *Perholtz*, 842 F.2d 343 (D.C. Cir.), cert. denied, 488 U.S. 821 (1988) 23
United States v. *Peters*, 732 F.2d 1004 (1st Cir. 1984) 20
United States v. *Sain*, 141 F.3d 463 (3d Cir.), cert. denied, 525 U.S. 908 (1998) 20, 25-26
United States v. *Turkette*, 452 U.S. 576 (1981) 9, 12, 14
United States v. *United Continental Tuna Corp.*, 425 U.S. 164 (1976) 16-17
United States v. *Weinberg*, 852 F.2d 681 (2d Cir. 1988) 27
United States v. *Wise*, 370 U.S. 405 (1962) 18, 20
VanDenBroeck v. *Commonpoint Mortgage Co.*, 210 F.3d 696 (6th Cir. 2000) 25

Cases–Continued: Page

Yellow Bus Lines, Inc. v. *Drivers Local Union 639*, 883 F.2d 132 (1989), rev'd in part on other grounds, 913 F.2d 948 (D.C. Cir. 1990), cert. denied, 501 U.S. 1222 (1991) 8, 10

Statutes and rule:

Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 947 (18 U.S.C. 1961 note) 13

Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961 *et seq.* 1

18 U.S.C. 1961 (1994 & Supp. IV 1998) 18, 1a

18 U.S.C. 1961(1) (1994 & Supp. IV 1998) 3, 1a

18 U.S.C. 1961(3) 2, 12, 18, 4a

18 U.S.C. 1961(4) 2, 12, 14, 18, 25, 4a

18 U.S.C. 1962 ..... 2, 4a

18 U.S.C. 1962(a) 10, 4a

18 U.S.C. 1962(b) 10, 5a

18 U.S.C. 1962(c) ..... *passim*

18 U.S.C. 1962(d) 2, 4, 5a

Sherman Act, 15 U.S.C. 1 *et seq.*:

15 U.S.C. 1 19

15 U.S.C. 2 19

18 U.S.C. 1341 3

18 U.S.C. 1343 3

Fed. R. Civ. P. 12(b)(6) 3

Miscellaneous:

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Restatement (Third) of the Law of Agency (Tentative Draft No. 1, 2000) 20

S. Rep. No. 617, 91st Cong., 1st Sess. (1969) 24

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INTEREST OF THE UNITED STATES

The Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.*, imposes criminal and civil liability for specified forms of racketeering activity by a "person" in connection with an "enterprise." The United States brings both criminal prosecutions and civil suits for violations of 18 U.S.C. 1962(c), the provision of RICO specifically at issue in this case. The court of appeals' holding—that a corporate employee acting within the scope of his employment may not be held liable under Section 1962(c) when the corporation is the named RICO enterprise—threatens to impede proper enforcement of the RICO statute in both criminal prosecutions and civil suits. Accordingly,

the United States has a significant interest in the Court's resolution of this case.

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the RICO statute, 18 U.S.C. 1961(3) and (4) and 18 U.S.C. 1962, are set forth in an appendix to this brief. App., *infra*, 1a-5a.

STATEMENT

1. As alleged in the complaint, petitioner is a corporation that competes with respondents, an individual and a corporation of which he is an employee, in the business of promoting professional boxing matches. See Pet. App. 5a, 7a. Petitioner filed a civil complaint against respondents, in which petitioner alleged substantive violations of RICO under 18 U.S.C. 1962(c) and conspiracy violations of RICO under 18 U.S.C. 1962(d). The complaint also alleged common-law fraud and tortious interference with contract, in violation of New York law. *Id.* at 2a-3a, 7a.

According to the complaint, respondents interfered with petitioner's contracts to represent two boxers named Hasim Rahman and Louis DelValle. Pet. App. 7a-9a; Compl. ¶¶ 3-6, 18-33. The complaint also alleges that respondents made various misrepresentations relating to a canceled Light Heavyweight fight between DelValle and Darrio Mattione, and fraudulently failed to pay petitioner $300,000 due under a contract between petitioner and Don King Productions, Inc. in connection with that fight. Pet. App. 9a; Compl. ¶¶ 34-37. Respondent King additionally is accused of falsely claiming to represent DelValle in the course of King's efforts to block another fight that petitioner had arranged for DelValle. Compl. ¶¶ 38-39. The complaint contains other allegations concerning respondents' allegedly fraudulent dealings in connection with their

representation of boxers Mike Tyson and Julio Cesar Chavez (*id.* ¶¶ 40-72, 84), although these activities are not alleged to have injured petitioner. Pet. App. 9a-10a.

Petitioner brought a substantive RICO claim under Section 1962(c) naming King as the RICO "person" and Don King Productions, Inc. and its successor-in-interest, DKP Corporation (collectively DKP) as the RICO "enterprise." Pet. App. 2a-3a, 8a n.2, 12a; see Compl. ¶¶ 74-75. The complaint states upon information and belief that Don King Productions, Inc. is a Florida corporation with its principal place of business in Florida, and that DKP Corporation is a New York corporation. Compl. ¶¶ 11, 12. King is alleged to be an employee of, "and otherwise associated with," DKP. *Id.* ¶ 75. King is an officer of DKP. Pet. App. 13a.[1] It was not disputed below that, with respect to the conduct alleged in the complaint, King acted within the scope of his authority as an employee of DKP. *Id.* at 5a.

The pattern of racketeering activity alleged in the complaint consists of King's and DKP's fraudulent interference with petitioner's contracts and includes multiple alleged acts of mail fraud (18 U.S.C. 1341), wire fraud (18 U.S.C. 1343), and bribery. Compl. ¶¶ 77, 79-84; see generally *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 495 (1985) ("racketeering activity" under RICO consists of commission of a predicate act listed in 18 U.S.C. 1961(1) (1994 & Supp. IV 1998)).

2. The district court dismissed the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). Pet. App. 15a. The district court first held that under *Discon, Inc.* v. *NYNEX Corp.*, 93 F.3d 1055, 1063 (2d Cir.

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[1] Respondents have advised the Court, without citation to the record, that King is DKP's sole shareholder and president. Br. in Opp. 1.

1996), vacated on other grounds, 525 U.S. 128 (1998), the RICO enterprise named in an action under Section 1962(c) and the persons conducting the affairs of the enterprise must be distinct. Pet. App. 11a. That distinctness requirement is not satisfied when the enterprise "consists merely of a corporate defendant associated with its own employees or agents carrying on the regular affairs of the defendant[.]" *Ibid.* (quoting *Riverwoods Chappagua Corp.* v. *Marine Midland Bank, N.A.*, 30 F.3d 339, 344 (2d Cir. 1994)). In this case, the court concluded, the alleged RICO enterprise (DKP) was not distinct from the RICO defendants (DKP and King) as required by *Discon* and *Riverwoods*. *Id.* at 11a-12a.

The district court further held that petitioner's request to amend the complaint by eliminating RICO claims against DKP (thereby making King the only RICO defendant) was futile. That "cosmetic adjustment" would be insufficient because the complaint did not allege, and petitioner did not otherwise suggest, that King acted outside the scope of his duties as an officer of DKP. Pet. App. 12a-13a. Because a "substantial" "overlap between the named RICO person and the alleged corporate enterprise" would remain after such an amendment, the distinctness requirement could not be met. *Id.* at 13a.

The district court concluded that petitioner's failure to plead a substantive RICO violation required dismissal of petitioner's conspiracy claim under Section 1962(d) as well. Pet. App. 13a-14a. Finally, having dismissed the federal RICO claims, the district court dismissed petitioner's remaining state-law fraud and tortious interference claims for lack of subject matter jurisdiction. *Id.* at 15a.

3. The court of appeals affirmed in a per curiam opinion. Pet. App. 1a-5a. Petitioner challenged on appeal only the district court's dismissal of the substantive RICO claim under 18 U.S.C. 1962(c). Pet. App. 3a. Furthermore, the parties agreed for purposes of the appeal that the RICO claims against DKP had been dropped in the district court, leaving King as the sole RICO defendant. *Id.* at 5a.

The court of appeals relied upon the undisputed fact that King was an employee acting within the scope of his authority at DKP to hold that *Riverwoods* and *Discon* precluded a finding of distinctness between King as the RICO person-defendant and DKP as the RICO enterprise. Pet. App. 3a-5a. Quoting *Riverwoods*, the court of appeals held that because a corporation functions through its employees and agents, employees of a corporation who "associate together to commit a pattern of predicate acts in the course of their employment and on behalf of the corporation * * * do not form an enterprise distinct from the corporation." *Id.* at 3a-4a (quoting 30 F.3d at 344). Moreover, under *Discon*, the requirement of distinctness between the defendant and the RICO enterprise is not satisfied when the alleged RICO enterprise is a parent corporation and the RICO defendants are incorporated subsidiaries. *Id.* at 4a (quoting *Discon*, 93 F.3d at 1064). Based on those holdings of *Riverwoods* and *Discon*, the court of appeals concluded that King, as an employee of DKP, is not sufficiently distinct from DKP to support a claim under Section 1962(c). *Id.* at 5a.

The court of appeals recognized that its decision was "in tension, if not conflict, with the decisions of other Courts of Appeals." Pet. App. 5a n.4. Indeed, it acknowledged that (by a conservative count) the Third, Sixth, Seventh, Ninth, and Tenth Circuits had all ruled

that sufficient distinctness exists between the RICO enterprise and the RICO defendant when a corporation is the alleged enterprise and the defendant is an owner, officer, or employee of the corporation. *Ibid.* (citing cases).[2]

SUMMARY OF ARGUMENT

1. The court of appeals correctly held that petitioner was required to name in its claim under 18 U.S.C. 1962(c) a "person" who is distinct from the alleged RICO "enterprise." The courts of appeals have uniformly adopted that construction of Section 1962(c), and it is consistent with the text and structure of the law. As generally applied by the courts of appeals, the requirement of distinctness between the RICO person and the RICO enterprise does not impede effective enforcement of the RICO statute by the government.

2. The court of appeals erred, however, in holding that a corporate employee is not sufficiently distinct from the corporation to satisfy the distinctness requirement. The plain language of Section 1962(c)—which extends liability to "any person employed by * * * any enterprise," when the person conducts the affairs of the enterprise through a pattern of racketeering activity —establishes that a corporate employee, such as re-

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[2] The Fifth Circuit likewise disagrees with the Second Circuit. *Khurana* v. *Innovative Health Care Sys., Inc.*, 130 F.3d 143, 156 (5th Cir. 1997) ("Section 1962(c) may impose liability on individual corporate officers and employees who conduct the corporate enterprise which employs them through a pattern of racketeering activity."). But see *Bessette* v. *Avco Fin. Servs., Inc.*, 230 F.3d 439, 449-450 (1st Cir. 2000) (relying on *Riverwoods* to hold that "employees acting solely in the interest of their employer, carrying on the regular affairs of the corporate enterprise, are not distinct from that enterprise").

spondent King, is a proper defendant when the alleged racketeering enterprise is the corporation. Any other reading of the law, moreover, would be inconsistent with Congress's direction that RICO should be applied broadly, and would create loopholes that legislators did not intend.

3. The appropriate test for whether an individual defendant under Section 1962(c) is sufficiently distinct from the alleged RICO enterprise is whether the defendant and the enterprise are "either formally * * * or practically * * * separable." *McCullough* v. *Suter*, 757 F.2d 142, 144 (7th Cir. 1985). That test has been adopted by several circuits and provides a workable standard that is consistent with Congress's intent to "remove the profit from organized crime by separating the racketeer from his dishonest gains." *Russello* v. *United States*, 464 U.S. 16, 28 (1983).

ARGUMENT

CORPORATE OFFICERS AND EMPLOYEES WHO CONDUCT A PATTERN OF RACKETEERING ACTIVITY THROUGH THEIR CORPORATION ARE SUBJECT TO RICO LIABILITY UNDER SECTION 1962(c)

A. The Defendant In An Action Under Section 1962(c) Must Be Distinct From The Alleged Racketeering Enterprise

The courts of appeals have uniformly held that a criminal indictment or civil complaint under Section 1962(c) must name a defendant who is "separate and distinct from" the alleged RICO enterprise. See *United States* v. *Goldin Indus., Inc.*, 219 F.3d 1268, 1270 (11th Cir. 2000) (en banc) (*Goldin Indus. I*) (collecting cases); see also, *e.g.*, cases cited at Pet. App. 4a-5a & n.4, and note 2, *supra*. In so holding, the lower courts have

relied primarily upon Section 1962(c)'s specification that the "person" liable for a violation of Section 1962(c) must be "employed by or associated with" the RICO enterprise. That language, the courts of appeals have held, demonstrates Congress's understanding that the defendant will be distinct from the enterprise. See, *e.g.*, *Yellow Bus Lines, Inc.* v. *Drivers Local Union 639*, 883 F.2d 132, 139-141 (1989) ("Logic alone dictates that one entity may not serve as the enterprise and the person associated with it because * * * 'you cannot associate with yourself.'") (quoting *McCullough*, 757 F.2d at 144), rev'd in part on other grounds, 913 F.2d 948 (D.C. Cir. 1990) (en banc), cert. denied, 501 U.S. 1222 (1991). The courts of appeals also have cited Congress's desire to target through RICO "criminal activity of a particular kind—the exploitation and appropriation of legitimate business by corrupt individuals"—as support for a requirement that the defendant be distinct from the enterprise through which racketeering activity is conducted. *Id.* at 139.[3]

Until its recent en banc decision in *Goldin Industries I*, *supra*, the Eleventh Circuit had held, to the contrary, that a single corporation "may be simultaneously both a defendant and the enterprise under RICO." *United States* v. *Hartley*, 678 F.2d 961, 988 (1982), cert. denied, 459 U.S. 1170, 1183 (1983). The *Hartley* decision relied upon RICO's expansive definitions of "person" and "enterprise" (discussed below), as well as this Court's

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[3] As this Court recognized in *Russello*, *supra*, "Congress' concerns were not limited to infiltration" of legitimate businesses. 464 U.S. at 28; see also *Sedima*, 473 U.S. at 499 (same). But Congress's "major purpose" in enacting RICO was "to address the infiltration of legitimate businesses by organized crime." *United States* v. *Turkette*, 452 U.S. 576, 591 (1981).

decision in *United States* v. *Turkette*, 452 U.S. 576, 580 (1981), and the broad remedial purpose of the RICO statute. See 678 F.2d at 988-991.

During the litigation of *Goldin Industries I*, we concluded that *Hartley* was wrongly decided (see 219 F.3d at 1271), and we adhere to that conclusion today.[4] The distinctness requirement, as generally applied by the courts of appeals under Section 1962(c), does not impede effective enforcement of RICO by the government. Critically, most courts of appeals have held that the requisite distinctness between the person and the enterprise is lacking only when there is *complete identity* between a particular defendant and the enterprise. As the Eleventh Circuit stated after overruling *Hartley*, "a defendant can clearly be a person under [Section 1962(c)] and also be *part* of the enterprise. The prohibition against the unity of person and enterprise applies only when the singular person or entity is defined as both the person and the only entity comprising the enterprise." *United States* v. *Goldin Indus., Inc.*, 219 F.3d 1271, 1275-1276 (11th Cir.) (*Goldin Indus. II*) (collecting cases), cert. denied, 121 S. Ct. 573 (2000). Accordingly, courts have concluded in a variety of circumstances that individual RICO defendants are distinct from an enterprise that is broader than any single defendant, notwithstanding that the defendants

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[4] Ten years ago, in responding to this Court's invitation to express views on a petition for a writ of certiorari in the *Yellow Bus* case, the United States took the position that *Hartley* represented the better interpretation of Section 1962(c). U.S. Amicus Br. 10, *Yellow Bus*, *supra* (No. 90-872). We noted, however, that the distinctness requirement then applied by a majority of circuits had not hampered the government's enforcement of RICO. *Ibid.*

may collectively comprise the enterprise and may have close relationships among themselves.[5]

The requirement of distinctness arises from the language and structure of Section 1962(c), and, as the courts of appeals have held, does not apply to claims brought under 18 U.S.C. 1962(a) or (b).[6] Whereas Section 1962(c) prohibits certain conduct by a person "employed by or associated with any enterprise," no similar phrase appears in Section 1962(a), which makes it illegal to invest the proceeds of racketeering activity in an enterprise that affects interstate commerce, or in Section 1962(b), which makes it unlawful to acquire or maintain an interest in an enterprise that is engaged in

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[5] See, *e.g.*, *United States* v. *Fairchild*, 189 F.3d 769, 776-777 (8th Cir. 1999) (requirement satisfied where individual defendants collectively form the enterprise); *United States* v. *London*, 66 F.3d 1227, 1243-1245 (1st Cir. 1995) (requirement satisfied where the enterprise consists of defendant's sole proprietorship and a closely held corporation), cert. denied, 517 U.S. 1155 (1996); *Securitron Magnalock Corp.* v. *Schnabolk*, 65 F.3d 256, 258, 262-263 (2d Cir. 1995) (officer, agent, and owner of two corporations is distinct from RICO enterprise consisting of that individual and the corporations), cert. denied, 516 U.S. 1114 (1996). That rule has been applied in the context of corporate defendants, as well as natural persons. See, *e.g.*, *Goldin Indus. II*, 219 F.3d at 1273, 1275-1276 (distinctness requirement satisfied where enterprise consists of four natural persons and three corporations, all of whom were also defendants); *Cullen* v. *Margiotta*, 811 F.2d 698, 703, 729-730 (2d Cir. 1987).

[6] See, *e.g.*, *Riverwoods*, 30 F.3d at 345; *New Beckley Mining Corp.* v. *United Mine Workers of Am.*, 18 F.3d 1161, 1163 (4th Cir. 1994); *In re Burzynski*, 989 F.2d 733, 743 (5th Cir. 1993) *Brittingham* v. *Mobil Corp.*, 943 F.2d 297, 303 (3d Cir. 1991); *Genty* v. *Resolution Trust Corp.*, 937 F.2d 899, 907 (3d Cir. 1991); *Busby* v. *Crown Supply, Inc.*, 896 F.2d 833, 840-841 & n.9 (4th Cir. 1990) (en banc); *Yellow Bus*, 883 F.2d at 140; *Schreiber Distrib. Co.* v. *Serv-Well Furniture Co.*, 806 F.2d 1393, 1396-1398 (9th Cir. 1986).

or affects interstate commerce, through a pattern of racketeering or collection of unlawful debt. See generally *Reves* v. *Ernst & Young*, 507 U.S. 170, 185 (1993) ("[Section] 1962(c) is limited to persons 'employed by or associated with' an enterprise, suggesting a more limited reach than subsections (a) and (b), which do not contain such a restriction."). A corporation or other business organization that has devoted itself to racketeering often can be held accountable under those provisions.

Construing Section 1962(c) to require some distinctness between the RICO defendant and the RICO enterprise produces a legally sound and workable reading of the RICO statute. Accordingly, the court of appeals in this case correctly held that "the alleged RICO 'person' and RICO 'enterprise' must be distinct." Pet. App. 3a (footnotes omitted).[7]

B. The Distinctness Requirement Is Satisfied Where The Defendant Is An Employee Of A Corporation That Is The RICO Enterprise

While the court of appeals did not err in requiring distinctness between the RICO person and the RICO defendant under Section 1962(c), its holding that "an employee acting within the scope of his authority"

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[7] The decision of the court of appeals might be read as turning upon petitioner's failure specifically to "assert [in the complaint] that King and DKP are distinct." Pet. App. 5a. We read the opinion to state a legal conclusion regarding the scope of Section 1962(c) and not merely a formal pleading requirement. On either reading, however, the judgment should be reversed. As explained below, a corporation and its employee are sufficiently distinct to satisfy Section 1962(c) as a matter of law, and the complaint in this case alleged the corporate status of DKP and that King is an employee of DKP. Compl. ¶¶ 11-13, 75.

cannot be sufficiently distinct from the corporate employer (Pet. App. 5a) is incorrect. Section 1962(c) specifically indicates that an employee of the alleged RICO enterprise may properly be named as the RICO person. That construction of Section 1962(c) is confirmed by this Court's decisions, as well as by the history and underlying policy of RICO.

1. Where the language of RICO "is unambiguous, in the absence of a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive." *Reves*, 507 U.S. at 177 (quoting *Turkette*, 452 U.S. at 580) (internal quotation marks omitted). In relevant part, Section 1962(c) makes it "unlawful for *any person employed by* or associated with *any enterprise* * * * to conduct or participate * * * in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." 18 U.S.C. 1962(c) (emphasis added). The underscored language establishes on its face that a RICO "person" may be "employed by" the entity that is named as the RICO enterprise.

RICO's definitional provisions confirm that understanding. Section 1961(3) provides, without limitation, that the term "'person' includes any individual or entity capable of holding a legal or beneficial interest in property." 18 U.S.C. 1961(3). Section 1961(4) defines the term "enterprise" to "include[] any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. 1961(4). Accordingly, a natural person such as King is a permissible "person" for purposes of Section 1962(c) and a corporation such as DKP may be named as the RICO enterprise. Moreover, by making "*any* person employed by or associated with *any* enterprise" potentially liable (18

U.S.C. 1962(c) (emphasis added)), Congress affirmatively signaled its intent that the courts would construe broadly the range of persons and enterprises who are within the reach of Section 1962(c). See *Salinas* v. *United States*, 522 U.S. 52, 57 (1997) ("The word 'any' * * * undercuts the attempt to impose [a] narrowing construction."); *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) (same).

Congress's clearly expressed intent in drafting the critical language of Section 1962(c) is reinforced by Congress's general intent in enacting RICO. Congress directed that RICO "shall be liberally construed to effectuate its remedial purposes." Pub. L. No. 91-452, § 904(a), 84 Stat. 947 (reprinted in 18 U.S.C. 1961 note); see *Russello*, 464 U.S. at 27. Legislators wanted to create "new weapons of unprecedented scope"— such as private rights of action in favor of those injured by racketeering activity—"for an assault upon organized crime and its economic roots." *Russello*, 464 U.S. at 26; *Sedima*, 473 U.S. at 498. In light of "Congress' self-consciously expansive language and overall approach," "RICO is to be read broadly." *Sedima*, 473 U.S. at 497-498. The court of appeals' inference that Congress did not intend employees of RICO enterprises to be liable for racketeering activity undertaken within the course of their employment lacks textual support and defies that congressional mandate.

The rule adopted by the court of appeals would frustrate the application of RICO in a variety of important settings. For example, if a corporation's president authorized corporate managers to bribe public officials to secure government contracts for the corporation, or to defraud the government in the corporation's business, then under the decision below the managers could not be charged with a violation of Section 1962(c) if the

corporation were named as the enterprise, because the managers would be acting within the scope of their corporate authority. Yet such a case would entail corruption of the channels of commerce and of the corporation-enterprise through a pattern of racketeering activity, and fall squarely within RICO's intended scope.[8] Cf. *Turkette*, 452 U.S. at 589 (refusing to exclude wholly illegitimate enterprises from the scope of Section 1961(4) because such a reading would place "[w]hole areas of organized criminal activity * * * beyond the substantive reach of the enactment").

The court of appeals' restrictive approach also is at odds with this Court's construction of Section 1962(c) in *Reves*, *supra*. *Reves* interpreted the requirement that the RICO person must "conduct or participate, directly or indirectly, in the conduct of [the] enterprise's affairs." 18 U.S.C. 1962(c). The Court held that the outside auditor of an agricultural cooperative that was an alleged RICO enterprise could not be held liable for a violation of Section 1962(c) under that language, because the auditor did not "participate in the operation or management of the enterprise itself," 507 U.S. at 185, but only prepared and explained the enterprise's financial statements, *id.* at 186.

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[8] See *Reves*, 507 U.S. at 182 (Section 1962(c) "prohibit[s] the *operation* of an enterprise though a pattern of racketeering activity."); *H.J. Inc.* v. *Northwestern Bell Tel. Co.*, 492 U.S. 229, 248 (1989) (RICO "responds to a new situation in which persons engaged in long-term criminal activity often operate *wholly* within legitimate enterprises."); *Turkette*, 452 U.S. at 579 (RICO liability extends to persons who take part in directing the affairs of the enterprise); see also, *e.g.*, *United States* v. *Horak*, 833 F.2d 1235 (7th Cir. 1987); *United States* v. *Kravitz*, 738 F.2d 102 (3d Cir. 1984), cert. denied, 470 U.S. 1052 (1985); *United States* v. *Huber*, 603 F.2d 387 (2d Cir. 1979), cert. denied, 445 U.S. 927 (1980).

The *Reves* Court rejected the argument that its "operation or management" test would allow only "upper management" to be held liable for violations of Section 1962(c). 507 U.S. at 184-185. The Court stated that although "complete 'outsiders'" who do not participate in conducting the RICO enterprise's affairs would not be liable for racketeering activity carried out though the enterprise, the "operation and management" standard does not limit liability under Section 1962(c) solely to upper management. The Court explained that "[a]n enterprise is 'operated' not just by upper management but also by lower rung participants in the enterprise who are under the direction of upper management." *Ibid.*[9] *Reves* thus confirms that the officers and directors of a RICO enterprise, as well as employees under their direction who participate in conducting the enterprise's affairs, are potentially subject to liability as RICO persons under Section 1962(c). The court of appeals' excision of those same upper managers and employees from the statute's coverage cannot be reconciled with the reasoning of *Reves*.

2. The court of appeals drew its bright-line rule against employee liability from *Riverwoods* and *Discon*. Pet. App. 4a-5a. But neither of those cases dealt with the situation of an employee as the "person" and a corporation as the "enterprise"—a prototypical situation contemplated by the drafters of the statute.

Riverwoods addressed the issue of whether a corporation can be both the RICO "person" and— together

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[9] The Court did not find it necessary to consider "whether low-level employees could be considered to have participated in the conduct of an enterprise's affairs," given that the accounting firm in *Reves* clearly was not acting under the direction of the co-op's officers or board. 507 U.S. at 184 n.9.

with its employees—the RICO "enterprise." Pet. App. 4a-5a; see *Riverwoods*, 30 F.3d at 344. In *Riverwoods*, borrowers brought a claim under Section 1962(c) against a bank defendant, alleging that the RICO enterprise was a "Restructuring Group" consisting of the bank and certain bank employees. 30 F.3d at 341, 343-345. The court's concern in *Riverwoods* was that allowing such a claim to proceed would enable RICO plaintiffs to "circumvent[]" the distinctness requirement of Section 1962(c) by superficially modifying a complaint that would ordinarily name the same corporation as both the RICO person and the RICO enterprise, so as to name the corporation alone as the defendant and the corporation together with "its own employees or agents carrying on the regular affairs of the defendant" as the RICO enterprise. *Id.* at 344. To avoid strategic pleading where the RICO defendant is a corporation, the Second Circuit held in *Riverwoods*—in language quoted in the decision below (Pet. App. 4a)—that "where employees of a corporation associate together to commit a pattern of predicate acts in the course of their employment and on behalf of the corporation, the employees in association with the corporation do not form an enterprise distinct from the corporation." 30 F.3d at 344.

Once a distinctness requirement is recognized under Section 1962(c), the rule adopted in *Riverwoods* is justifiable to protect against circumvention of this requirement when a corporation is named as the RICO defendant. Absent such a rule, the prohibition on naming the same corporation as both the defendant and the RICO enterprise could be routinely evaded by listing corporate officers and employees as part of the enterprise, without affecting the gravamen of the complaint. Cf. *United States* v. *United Continental Tuna Corp.*,

425 U.S. 164, 169 (1976) ("We should * * * be as hesitant to infer that Congress intended to authorize evasion of a statute at will as we are to infer that Congress intended to narrow the scope of a statute."). By contrast, the text of Section 1962(c) and the definitions of "person" and "enterprise" establish the permissibility of naming a natural person as the RICO defendant and a corporation as the RICO enterprise. Any rule that forbade such pleading would frustrate, rather than effectuate, the distinctness requirement established by Congress. Accord *Brittingham* v. *Mobil Corp.*, 943 F.2d 297, 301-302 (3d Cir. 1991) (requiring an "examin[ation]" whether a corporation named as the RICO enterprise "is no more than an association of individuals or entities acting on behalf of a defendant corporation," but noting that "distinctiveness concerns are generally not present" when a natural person is named as the person-defendant).

Discon, on which the court of appeals secondarily relied, also dealt with a corporation and not an individual as the RICO "person." *Discon* held in relevant part that Section 1962(c)'s distinctness requirement was not satisfied where a holding company and two of its subsidiaries were named as both the RICO defendants and (together with unnamed agents acting within the scope of their agency) the RICO enterprise. 93 F.3d at 1057-1058, 1063-1064. The court of appeals found that the three corporations, although legally separate entities, were part of a unified corporate structure and were "guided by a single corporate consciousness." *Id.* at 1064. On those facts, the court of appeals determined that separate incorporation of the three entities was not dispositive, and the defendants (the three corporations, individually) each should be deemed identical to the alleged RICO enterprise (the three corporations and

their unnamed agents, collectively). *Ibid.* Once again, that holding does not justify the rule applied in this case—that a natural person employed by a corporation may not be sued under Section 1962(c) where the corporation is named as the RICO enterprise.

3. General corporate law principles also do not support the rule applied by the court of appeals in this case. Underlying the holding below is the assumption that when King acted within the scope of his employment with DKP, he was indistinguishable from DKP. See Pet. App. 5a ("As it is undisputed that King was an employee acting within the scope of his authority at DKP, [petitioner] does not assert that King and DKP are distinct."). Whatever validity that assumption may have in other contexts, it has none in the context of a RICO claim under Section 1962(c).

Most importantly, and as explained above, the controlling question here is one of statutory interpretation. Section 1962(c) and the definitions of Section 1961 do not deny corporate employees who act within the scope of their employment the status of being "persons." Just the opposite is true. Natural persons are RICO "persons" under 18 U.S.C. 1961(3) who may be named as defendants; a corporation may be named as the "enterprise" under 18 U.S.C. 1961(4); and the plain language of Section 1962(c), as well as this Court's holding in *Reves*, establish that an employee of the named enterprise may be held liable for conducting racketeering activity through the enterprise. See pp. 11-15, *supra*. Cf. *United States* v. *Wise*, 370 U.S. 405, 407 (1962) (finding "[n]o substantial support" in the language of "a seemingly clear statute" for the argument that the Sherman Act does not apply to corporate officers acting

in their representative capacity, and that the acts of such persons are chargeable only to the corporation).[10]

The law of agency, moreover, addresses only "the legal consequences of consensual relationships in which one person (the 'principal') manifests consent that another person (the 'agent') shall have power to affect

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[10] This Court's rejection of the "intracorporate conspiracy doctrine" in the context of Sherman Act antitrust claims is unrelated to whether a corporate employee can be held liable under Section 1962(c) for conducting the affairs of the corporation-enterprise through a pattern of racketeering activity. See *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752 (1984). *Copperweld* rested upon Congress's distinction in the antitrust laws between concerted activity by previously separate economic actors, which is covered by 15 U.S.C. 1, and unilateral activity by a single economic actor, which is covered by 15 U.S.C. 2. In light of the very different regimes established by Sections 1 and 2 of the Sherman Act, see 467 U.S. at 767-769, the Court held that the "antitrust dangers that § 1 was designed to police" are not implicated when officers or employees of the same corporation act together, or a parent corporation acts with its wholly owned subsidiary, *id.* at 769-774. Such natural or corporate persons, although distinct and under some circumstances capable of conspiring with each other, "are not separate economic actors pursuing separate economic interests." *Id.* at 769, 776. In particular, although a corporation and its officers are "persons" under the Sherman Act, liability based upon a conspiracy between the corporation and the officers is precluded by "the logic underlying Congress' decision to exempt unilateral conduct from § 1 scrutiny." *Id.* at 770 n.15, 776. *Copperweld*'s application of "the [Sherman] Act's distinction between unilateral and concerted conduct" (*id.* at 775) therefore does not provide any guidance in determining when natural or legal persons are distinct for purposes of Section 1962(c). See *Haroco* v. *American Nat'l Bank & Trust Co.*, 747 F.2d 384, 403 n.22 (7th Cir. 1984) ("The policy considerations discussed in *Copperweld* * * * do not apply to RICO, which is targeted primarily at the profits from patterns of racketeering activity."), aff'd per curiam on other grounds, 473 U.S. 606 (1985).

the principal's legal relations through the agent's acts and on the principal's behalf, and subject to the principal's right of control." Restatement (Third) of the Law of Agency 1 (Tentative Draft No. 1, 2000). Agency doctrines such as respondeat superior are legal devices that force corporations to assume financial responsibility for costs associated with their business. *Hartley*, 678 F.2d at 970; see *Faragher* v. *City of Boca Raton*, 524 U.S. 775, 797 (1998). Those devices do not negate the actual distinctness of principal and agent. For example, a corporation and its officers and employees generally may be convicted of conspiring together to violate the criminal law, regardless of whether the officers and employees acted in a corporate capacity that would support a finding of agency.[11] See *United States* v. *Peters*, 732 F.2d 1004, 1008 n.7 (1st Cir. 1984) ("There is a world of difference between invoking the fiction of corporate personality to *subject* a corporation to civil liability for acts of its agents and invoking it to *shield* a corporation or its agents from criminal liability where its agents acted on its behalf."). The legal rules that render a corporation liable for the acts of its agents therefore provide no basis for immunizing an officer or employee from RICO liability where the officer or

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[11] See, *e.g.*, *Wise*, *supra*; *United States* v. *Ames Sintering Co.*, 927 F.2d 232, 236 (6th Cir. 1990) ("This court has held a number of times that a corporation may conspire with its officers and employees."); *United States* v. *Hugh Chalmers Chevrolet-Toyota, Inc.*, 800 F.2d 737, 738 (8th Cir. 1986) ("[A] corporation may be responsible when two or more high ranking or authoritative agents engage in a criminal conspiracy on its behalf."); see also *United States* v. *Sain*, 141 F.3d 463, 473-475 (3d Cir.) (corporation may be a conspirator under respondeat superior theory where at least two natural persons have the required mental state to form a conspiracy), cert. denied, 525 U.S. 908 (1998).

employee has committed crimes through the corporation as enterprise.[12]

4. Finally, determining whether an employee is acting within the scope of her employment is fraught with difficulty. Inconsistent holdings on this issue reflect not just differing facts, but "differing judgments about the desirability of holding an employer liable for his subordinates' wayward behavior." *Faragher*, 524 U.S. at 796. As this Court recently concluded in the Title VII context, there is no "mechanical" test for whether an employee is acting within the scope of employment. *Id* at 797. The scope-of-employment test proposed by the court of appeals in this case therefore would add an additional element of indefiniteness and judicial discretion in determining RICO liability under Section 1962(c).

C. The Distinctness Requirement Is Satisfied When the RICO Person And The RICO Enterprise Are Either Legally Or Practically Separable

Although the court of appeals plainly erred in holding that corporations and their employees (acting within the scope of their employment) are per se indistinct for purposes of Section 1962(c), there is a workable test for determining when a natural person named as the RICO person and a business named as the RICO enterprise

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[12] It is not definitively resolved whether a corporate employer may be held vicariously liable for its agents' violations of Section 1962(c) in a civil case. See *Davis* v. *Mutual Life Ins. Co.*, 6 F.3d 367, 378-380 (6th Cir. 1993), cert. denied, 510 U.S. 1193 (1994); *Brady* v. *Dairy Fresh Prods. Co.*, 974 F.2d 1149, 1154-1155 (9th Cir. 1992). That question, however, assumes that RICO liability has been established. Its resolution does not turn on whether the corporation and its agents are distinct for purposes of pleading a claim under Section 1962(c).

meet the distinctness requirement of Section 1962(c). The appropriate standard, we suggest, is the test articulated by Judge Posner in *McCullough*, *supra*, and applied by the Seventh Circuit and other courts for more than 15 years: the enterprise and the defendant must "be either formally * * * or practically * * * separable." *McCullough*, 757 F.2d at 144; *Richmond* v. *Nationwide Cassel L.P.*, 52 F.3d 640, 647 (7th Cir. 1995) (adopting *McCullough* test); *United States* v. *Benny*, 786 F.2d 1410, 1415-1416 (9th Cir.) (same), cert. denied, 479 U.S. 1017 (1986); see *Jaguar Cars, Inc.* v. *Royal Oaks Motor Car Co.*, 46 F.3d 258, 269 (3d Cir. 1995) (relying upon *McCullough*); *Guidry* v. *Bank of LaPlace*, 954 F.2d 278, 283 (5th Cir. 1992) (same). That test looks first to whether there is legal distinctness between the person and enterprise (such as where the defendant is a natural person and the enterprise is the corporation that employs him); and, if there is not legal distinctness, to whether there nevertheless is a practical distinction (such as where the defendant operates a sole proprietorship-enterprise that has employees other than the owner). See *McCullough*, 757 F.2d at 144. That test is easily administered, and— unlike the rule applied by the court of appeals in this case—it responds to the underlying policies that Congress intended RICO to serve. See generally *Sedima*, 473 U.S. at 497-498.

For instance, even if *all* the officers, directors, and employees of a corporation were named individually as defendants, each individual defendant would be sufficiently distinct from the corporation to allow an action under Section 1962(c) where the corporation is named as the enterprise. Accord *Goldin Indus. II*, 219 F.3d at 1275-1277 (citing cases); *Jaguar Cars*, 46 F.3d at 268-269. In that situation, the named individual defendants

are legally separate from the corporation, making it unnecessary to rely on the fact that they are practically separate as well, by virtue of being natural persons. It would be highly anomalous, moreover, if a group of racketeers could protect one or all of themselves from RICO liability merely by incorporating their activities.[13]

The practical consequences of a rule that did not allow a Section 1962(c) action against corporate officers and employees to go forward in that situation would be severe. For example, the United States has brought a number of civil RICO lawsuits to eliminate organized crime's influence and control over labor unions. The RICO enterprise in such cases typically consists of a labor union and its subordinate entities and the RICO defendants include multiple corrupt union officials.[14] Precluding such actions against union officials—on the theory that they are not "distinct" from their labor unions—would be inconsistent with a central purpose of RICO's remedial provisions: removing from labor unions corrupt leaders who have conducted the affairs

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[13] Cf. *United States* v. *Perholtz*, 842 F.2d 343, 353 (D.C. Cir.) ("This interpretation hardly accords with Congress' remedial purposes: to design RICO as a weapon against the sophisticated racketeer as well as (and perhaps more than) the artless."), cert. denied, 488 U.S. 821 (1988); *McCullough*, 757 F.2d at 143-144 ("[W]e cannot believe that Congress would have wanted gangsters to be able to escape the clutches of section 1962(c) just by avoiding the corporate form.").

[14] *E.g.*, *United States* v. *Local 30, United Slate, Tile & Composition Roofers*, 871 F.2d 401 (3d Cir.), cert. denied, 493 U.S. 953 (1989); *United States* v. *Local 560 of Int'l Bhd. of Teamsters*, 780 F.2d 267 (3d Cir. 1985), cert. denied, 476 U.S. 1140 (1986); *United States* v. *District Council of United Bhd. of Carpenters*, 778 F. Supp. 738 (S.D.N.Y. 1991); *United States* v. *Local 6A, Cement & Concrete Workers*, 663 F. Supp. 192 (S.D.N.Y. 1986).

of their union through a pattern of racketeering activity. See S. Rep. No. 617, 91st Cong., 1st Sess. 78 (1969).

The *McCullough* test likewise is satisfied when the defendant individual is the sole owner of a corporation that is the alleged RICO enterprise.[15] In that circumstance, the defendant's choice to use the corporate form to carry out racketeering activity would establish legal distinctness. *McCullough*, 757 F.2d at 144; see generally *Burnet* v. *Clark*, 287 U.S. 410, 415 (1932) ("A corporation and its stockholders are generally to be treated as separate entities."); *New Colonial Ice Co.* v. *Helvering*, 292 U.S. 435, 442 & n.3 (1934) (same); see also 1 William M. Fletcher, *Fletcher Cyclopedia of the Law of Private Corporations* §§ 7, 25 (1999 ed.). As noted in *McCullough*, a natural person who utilizes the corporate form to pursue business interests "gets some legal protections * * * such as limited liability" as a result. 757 F.2d at 144; see *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 772-773 & n.20 (1984) (discussing benefits of separate incorporation); *NLRB* v. *Deena Artware, Inc.*, 361 U.S. 398, 402-403 (1960) ("The insulation of a stockholder from the debts and obligations of his corporation is the norm, not the exception."); *LeBoeuf, Lamb, Greene & MacRae, L.L.P.* v. *Worsham*, 185 F.3d 61, 66 (2d Cir. 1999) (eliminating stockholders' personal liability is "in many cases the major reason for" incorporation, and state law "also recognizes that officers and directors are, in general, not liable for the debts of the corporation"). A RICO

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[15] Petitioner asserts that DKP is "closely held" and that its affairs are conducted by King. Pet. 5. Those assertions were not made in the complaint upon which the district court ruled, however, and they were not a basis for the lower courts' rulings in this case.

defendant who invokes the corporate form to secure its benefits should not be heard to argue that the corporation's separateness should be ignored when it becomes a liability.[16]

Courts have rejected similar attempts to avoid liability in other contexts. For instance, this Court refused to disregard the corporate form in *Moline Properties, Inc.* v. *Commissioner*, 319 U.S. 436 (1943), a tax case, because incorporation "fills a useful purpose * * * [w]hether the purpose be to gain an advantage under the law of the state of incorporation or to avoid or to comply with the demands of creditors or to serve the creator's personal or undisclosed convenience." *Id.* at 438-439 (footnotes omitted). The sole owner of a corporation likewise may be convicted of aiding and abetting the corporation in the commission of crimes. *E.g., United States* v. *Sain*, 141 F.3d 463, 473-475 (3d Cir.) (rejecting as "pure sophistry" the argument that a sole shareholder may invoke the corporate form to protect against personal liability, "without accepting the burden of assuming criminal responsibility when the individual causes the corporation to commit a

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[16] See *Sever* v. *Alaska Pulp Corp.*, 978 F.2d 1529, 1534 (9th Cir. 1992) ("[T]he fact that there was but one stockholder [of a corporation-enterprise] would not shield that individual from suit because such a corporate 'one-man' band does receive some legal protections from the corporate form, and it is this sort of legal shield for illegal activity that Congress intended RICO to pierce.") (internal quotation marks and citation omitted); *McCullough*, 757 F.2d at 144 (same); *VanDenBroeck* v. *Commonpoint Mortgage Co.*, 210 F.3d 696, 701 (6th Cir. 2000) (sole shareholder is sufficiently distinct from corporation to support holding shareholder liable under RICO). RICO provides that a corporation may be named as an "enterprise," 18 U.S.C. 1961(4), and makes no exception for closely-held or solely-owned corporations.

crime"), cert. denied, 525 U.S. 908 (1998). And a leading treatise endorses the rule "that a person who has voluntarily adopted the corporate form to engage in business is precluded from asking courts to disregard that form merely because the person is disadvantaged by its use." 1 Fletcher, *supra*, § 41.71, at 686.

The doctrine of "piercing the corporate veil" is not to the contrary. Under that doctrine, the separate identity of a corporation may be disregarded—and shareholders may be held individually liable for the corporation's conduct—"in exceptional situations where [the corporate form] otherwise would present an obstacle to the due protection or enforcement of public or private rights." *New Colonial Ice*, 292 U.S. at 442; see *United States* v. *Bestfoods*, 524 U.S. 51, 62 (1998) ("[T]he corporate veil may be pierced and the shareholder held liable for the corporation's conduct when, *inter alia*, the corporate form would otherwise be misused to accomplish certain wrongful purposes * * * on the shareholder's behalf.").[17] Courts should "not disregard the corporate entity without a showing that the corporate form has been abused," *United States* v. *Fidelity Capital Corp.*, 920 F.2d 827, 837 (11th Cir. 1991), and the doctrine has no application when the result would be to frustrate application of the law. See 1 Fletcher, *supra*, § 41, at 563 ("as a general rule, the corporation will be viewed as a legal entity unless it is used to defeat public convenience or perpetrate or protect crime or fraud"). Thus, while the corporate veil may be pierced to effectuate legislative policies, see

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[17] The doctrine is applied under many names. See Harry G. Henn & John R. Alexander, *Laws of Corporations* 344-345 n.2. (3d ed. 1983) (listing various "verbal characterizations, epithets, and metaphors" synonymous with piercing the corporate veil).

Moline Props., 319 U.S. at 439; *Anderson* v. *Abbott*, 321 U.S. 349, 363 (1944), the corporate form is never disregarded under a proper application of this doctrine where doing so would frustrate enforcement of a statute.

Finally, where the alleged RICO enterprise is an unincorporated sole proprietorship that is not legally separable from the individual defendant, *McCullough*'s "practically separable" standard would govern the determination of distinctness. In that context, factors such as the defendant's employment of others to conduct the enterprise would be sufficient to render the defendant distinct from the enterprise. See *McCollough*, 757 F.2d at 144; *Benny*, 786 F.2d at 1415-1416; *United States* v. *London*, 66 F.3d 1227, 1244 (1st Cir. 1995), cert. denied, 517 U.S. 1155 (1996); *United States* v. *Weinberg*, 852 F.2d 681, 684-685 (2d Cir. 1988); but see *Guidry* v. *Bank of LaPlace*, 954 F.2d at 283 (unincorporated sole proprietorship that "is merely a name under which [the RICO 'person'] did business for the purposes of carrying out his scheme" is not distinct from the person). But no such inquiry is required where, as here, the defendant is a natural person alleged to have conducted the affairs of his incorporated employer through a pattern of racketeering activity.[18]

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[18] While "practical" distinctness is not necessary to maintain an action under Section 1962(c) when the enterprise is legally distinct from a natural person named as defendant, such distinctness is present on the face of the complaint in this case. Petitioner alleged that the RICO enterprise, DKP, had a controller and an insurance broker who were not named as defendants. Compl. ¶¶ 65, 66. That allegation provides additional support for a determination that DKP is sufficiently distinct from King to allow petitioner's Section 1962(c) claim to go forward at this preliminary stage of the pro-

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

BARBARA D. UNDERWOOD
Acting Solicitor General
JOHN C. KEENEY
Acting Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
AUSTIN C. SCHLICK
Assistant to the Solicitor General
DEBORAH WATSON
FRANK J. MARINE
Attorneys

JANUARY 2001

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ceedings. The government, however, takes no position on the merits of any of petitioner's claims.

APPENDIX

1. Section 1961 of Title 18 of the United States Code (1994 & Supp. IV 1998) provides, in pertinent part:

Definitions

As used in this chapter—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1028 (relating to fraud and related activity in connection with identification documents), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), section 1425 (relating to the procurement of citizenship or nationalization

unlawfully), section 1426 (relating to the reproduction of naturalization or citizenship papers), section 1427 (relating to the sale of naturalization or citizenship papers), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1542 (relating to false statement in application and use of passport), section 1543 (relating to forgery or false use of passport), section 1544 (relating to misuse of passport), section 1546 (relating to fraud and misuse of visas, permits, and other documents), sections 1581-1588 (relating to peonage and slavery), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), sections 2251, 2251A, 2252, and 2260 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), sec-

tion 2318 (relating to trafficking in counterfeit labels for phonorecords, computer programs or computer program documentation or packaging and copies of motion pictures or other audiovisual works), section 2319 (relating to criminal infringement of a copyright), section 2319A (relating to unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances), section 2320 (relating to trafficking in goods or services bearing counterfeit marks), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11 (except a case under section 157 of this title), fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), punishable under any law of the United States, (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act, or (F) any act which is indictable under the Immigration and Nationality Act, section 274 (relating to bringing in and harboring certain aliens), section 277 (relating to aiding or assisting certain aliens to enter the United States), or section 278 (relating to importation of alien for immoral purpose) if the act indictable under such section of

such Act was committed for the purpose of financial gain.

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(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity[.]

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2. Section 1962 of Title 18 of the United States Code provides:

Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be

unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.